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### The Protection of Instream Flows in Montana: A Legal-Institutional Perspective

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**THE PROTECTION OF INSTREAM FLOWS IN MONTANA:  
A LEGAL-INSTITUTIONAL PERSPECTIVE**

by

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## I. THE WATER RESOURCE SITUATION

Montana is a water-rich state. Its mountains form the headwaters of the Missouri and Columbia rivers. Each year, an average of 44 million acre-feet of water leave the state. Millions of tourists enjoy the spectacular streams and lakes of Montana including those of Yellowstone and Glacier national parks, the Lewis and Clark trail, and Montana's numerous wilderness areas. Many of these streams are nationally known for their beauty and fish production; in fact, Montana sells the third largest number of non-resident sport fishing licenses in the United States.

Although the water resource of Montana is seemingly plentiful, the state is rightfully classified as semi-arid. Statewide, the average precipitation is about 14 inches; much of that moisture falls as snow over the mountainous regions. For the most part, the eastern two-thirds of Montana receives less than 14 inches of precipitation each year. Thus, irrigation has become an essential concomitant of a stable agricultural industry, the backbone of the state's economy. However, this longstanding irrigation water use is not without its price. Each year, the irrigation of approximately 2,807,000 acres of land in Montana depletes about 3,136,000 acre-feet of water from the state's streams. As a result, many streams are at times seriously dewatered. The dichotomy of apparent abundance and large depletions for irrigation use therefore sets the stage for one of Montana's foremost water resource conflicts: preserving

the state's rich instream flow values in the face of increasing consumptive use.

## **II. THE SIGNIFICANCE OF INSTREAM FLOWS**

Instream flows provide a variety of social and environmental values and experiences that are synonymous with the "Big Sky" state. Instream flows support fish and wildlife, recreation, and scenic and aesthetic resources. These amenities not only attract visitors to the state, but form the core of a lifestyle that many Montana natives know and love. Indeed a significant part of the heritage of Montana revolves around hunting, fishing, and the appreciation of the outdoors.

While Montanans have developed a lifestyle around hunting, fishing, and enjoying the outdoors, these activities also provide economic benefits to the state. According to a recent study (Duffield, et al., 1987), the annual net economic values of fishing in Montana's coldwater lakes and streams are \$93 million and \$156 million, respectively. Although this value is substantial, it is conservative since it does not include dollars spent in pursuit of hiking, picnicing, floating, and otherwise recreating in and around streams and rivers throughout the state. A recent survey discovered that more people floated Montana's rivers than visited state parks.

Instream flows are also important in maintaining the quality of Montana's waters. In many rivers, such as the

Missouri, reducing the amount of flow also decreases the river's capacity to absorb pollutants. Instream flows also play a critical role in recharging aquifers that supply a wide variety of consumptive uses.

In addition to the social and economic importance of instream flows to Montana, the state recognizes its responsibility in managing water resources, including the protection of public instream values. Indeed, the water policy of the state specifies that "the water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life" (Section 85-1-101(5), MCA)

While instream uses of water have not always been legally recognized as beneficial, they have always been socially valued. As the maintenance of instream flows has grown to be a major use of western water, Montana has fine tuned its legal and institutional systems to assure that instream uses are fairly considered along with more traditional consumptive uses.

### **III. EXISTING POLICIES, PROGRAMS, AND STRATEGIES**

Several strategies are available in Montana to protect instream flows. These strategies, which range from a basin-wide water reservation process, to conditioning water rights permits, to managing reservoirs for instream flow purposes, vary in application and effectiveness. Together, however, they provide a relatively comprehensive, if uncoordinated, array of strategies.

### 1. Murphy Rights

In 1969, the Montana legislature enacted a law allowing the Montana Fish and Game Commission to file for water rights on the unappropriated waters of 12 "blue ribbon" streams in order to maintain stream flows necessary for the preservation of fish and wildlife habitat (Section 89-801(2), RCM 1947). The resulting appropriations, known as "Murphy rights" after the principal sponsor of the bill, have a priority over other uses only until the district court in which the streams are located determines that such waters are needed for a more beneficial use.

Under this statutory authority, the Montana Department of Fish, Wildlife, and Parks has filed for appropriations on all 12 "blue ribbon" streams in Montana, including Big Spring Creek, Blackfoot River, Flathead River, Gallatin River, Madison River, Missouri River, Rock Creek (Clark Fork), Smith River, Yellowstone River, and the Middle, South, and North Forks of the Flathead River. To date, the appropriations have not been challenged in court by other water users.

While the Murphy rights legislation was repealed in 1973, the claimed appropriations remain valid. As of June, 1987, temporary preliminary decrees have been issued on Big Spring Creek, the Gallatin River, the Madison River, Rock Creek, the Yellowstone River, the Middle Fork of the Flathead River, and the South Fork of the Flathead River. Temporary preliminary decrees have not been issued on the Blackfoot River, the Missouri River, the Flathead River, the Smith River, or the North Fork of the Flathead River.



Since the statutory authority for Murphy rights is no longer applicable, and never was intended to be applicable to all streams within the state, it is a very limited, although valuable strategy for protecting instream <sup>flows</sup> ~~values~~. If instream flows are to be protected in other parts of the state, additional strategies will have to be employed.

## 2. Water Reservations

In 1973, the Montana Water Use Act was enacted and set forth a systematic and comprehensive mechanism for the protection of instream values (Section 85-2-316, MCA). The law provides an opportunity to reserve water for future diversionary and consumptive uses as well as for maintaining stream flows for the protection of existing water rights, aquatic life, and water quality (Section 85-2-316(1), MCA).

Under the reservation statute, the state or any political subdivision of the state, including federal agencies, may apply to the Board of Natural Resources and Conservation to reserve water for both offstream uses as well as instream uses, including future irrigation, municipal growth, multipurpose storage, recreation, fish and wildlife, and maintenance of water quality. Applications must include a description of the purpose, an analysis of the need for the reservation, a quantification of the amount of water requested as well as the amount available, an analysis that the reservation is in the public interest, and a management plan (Administrative Rules of Montana 36.16.104).

Upon receiving a reservation application, the Department of Natural Resources and Conservation (DNRC) processes it through

the procedures outlined in Sections 85-2-307 through 85-2-309, MCA. In general, the DNRC must publish the facts of the application in a newspaper of general circulation in the area affected by the proposed reservation. In addition, it must notify any water user, including federal agencies, that may be affected by or interested in the proposed reservation. The DNRC may also notify other state departments and interest groups with an interest in the reservation.

After this notification process, the DNRC must accept objections, if any, to the proposed reservation (Section 85-2-308, MCA). Those objecting to the reservation must specify how it would adversely affect their water rights or other interests. If the DNRC determines that an objection is valid, it must then hold a public hearing (Section 85-2-309, MCA).

Once the objections have been resolved, the Board may adopt an order reserving water provided that the applicant has shown that:

1. there is a need for the reservation;
2. the amount of water requested is necessary for the stated purpose of the reservation;
3. the reservation is in the public interest;
4. special criteria are met if the use is to be out of state (Section 85-2-316(7) and (8), MCA).

Unless otherwise specified by the legislature, the priority date for a reservation is the date the Board adopts an order reserving water (Section 85-2-316(9), MCA).

Reservations are to be reviewed at least once every ten years, and if the objectives of the reservation are not being met, the Board may extend, revoke, or modify the reservation (Section 85-2-316(10), MCA). If the total amount of an instream flow reservation is not needed to fulfill its purpose, and an applicant can show that its need outweighs the need of the original reservant, the Board is allowed to reallocate the excess to another qualified reservant (Section 85-2-316(11), MCA). Reallocation may only take place once every five years, and the reallocation amount retains the original reservation priority date.

To date, instream flows have been reserved on 69 stream segments in the Yellowstone River Basin. The 69 stream segments constitute a total of about 2,078 stream miles, or approximately 12.5 percent of the total stream miles in the state. Recognizing that the same water is double-counted in some cases, a yearly average flow of approximately 28,357 cubic feet per second have been reserved in the Yellowstone River Basin for instream uses, which accounts for about 18.5 percent of the total water use in the state.

In addition to the instream flows that have been reserved and approved in the Yellowstone River Basin, applications are pending on 25 stream segments in the Clark Fork River Basin in western Montana. If approved, these 25 segments will constitute a total of about 400 stream miles, or approximately 2.5 percent of the total stream miles in the state. A yearly average of approximately 2,155 cubic feet per second would be reserved or

about 2 percent of the total water use in the state. A basin-wide process is also currently underway to reserve water in the Missouri River watershed, potentially adding significantly to waters reserved statewide for instream purposes.

While the reservation process provides a mechanism to evaluate the instream flow needs of a stream or watershed, to balance instream with future consumptive uses, and to legally protect needed instream flows, it is time-consuming, costly, and potentially pits one type of water use against another. The reservation process also puts a greater burden of proof initially on the applicants when compared to water use permit applicants. However, once water is allocated under these two different systems, the burden on the permittee is greater since he/she must put water to a beneficial use within a few years, whereas the reservant has 20 to 30 years to put water to use. The reservation process also often requires an environmental impact statement when reserving large quantities of water for instream use. These requirements necessitate a significant amount of data, manpower, time, and money. In addition, unlike the water use permits which are granted a priority as of the date of application, priority dates for reservations are not established until the applications have been approved, and the application preparation and review process can often take years. (An exception to this statutory provision is the 1984 priority date established by the legislature for reservations in the Missouri River Basin even though the reservation process is not expected to be completed until 1993.)

Reservations must also be reviewed at least once every ten years and may be modified at that time, thereby rendering them less secure than appropriations received under the water permitting process or consumptive use reservations that have been put to beneficial use. The Board may also reallocate water reserved for instream flows once every five years if a competing applicant can show that his need outweighs the need of the instream flow reservant (Section 85-2-316(11), MCA). In addition a reservation for instream flow cannot exceed 50 percent of the average annual flow on gauged streams, and this may not be sufficient in all cases (Section 85-2-316(6), MCA).

Finally, only a few public entities are using the reservation process to protect instream flows, including the state Department of Fish, Wildlife, and Parks, the state Department of Health and Environmental Science, the U.S. Bureau of Land Management, and the North Custer Conservation District. The U. S. Forest Service, the National Park Service, and the U. S. Fish and Wildlife Service, all managers of land areas possessing significant instream values, have not shown an interest in using the reservation process to protect instream flows on public lands.

### 3. State Recreational Waterway Program

In 1972, the state Department of Fish, Wildlife, and Parks (DFWP) established a "State Recreational Waterway Program" through administrative rulemaking. The purposes of the program are: 1) to maintain and improve Montana's prime free-flowing and

productive streams, 2) to improve other streams so they may be added to the system, and 3) to encourage and obtain multiple recreational attributes of streams in the system, with special emphasis on fishing.

The program extends the original blue-ribbon fisheries concept and identifies ten criteria for selecting streams, including: ribbon fisheries, recreational potential, historic and scenic qualities, recreational economic opportunities, hunting areas, waterfowl habitat, freedom from pollution, adequate public access, stream protection potential, and popular request and interest.

Although the program is not legislated or specifically funded, it does provide a framework for identifying and prioritizing streams based on the values cited above. The Northwest Rivers Study could serve as a data base for the program. In addition, the program could provide an additional mechanism for the protection of instream values by resolving issues related to the legal recognition of recreation as a beneficial use, public access, the protection of scenic corridors, and the authority to regulate incompatible uses and hydropower development. The administrative rules might also be revised to allow the DFWP to establish instream flows through either the reservation or permitting process in order to protect the free-flowing conditions of the waterways.

To date, several stream segments have been included in the State Recreational Water System, including the Flathead River system above Flathead Lake and above Hungry Horse Reservoir, the

Missouri River from Fort Benton to Fort Peck, Rock Creek near Missoula, the Smith River, and the Yellowstone River. The first two rivers mentioned have subsequently designated under the National Wild and Scenic River system.

#### 4. Conditioning Water Rights Permits

A third strategy available to protect instream values is the application of "reasonable use" or "public interest" criteria for initial permit applications and for changes in appropriative rights (Section 85-2-311(2)(c), MCA). Where a person wishes to appropriate more than 4,000 acre-feet per year and 5.5 cubic feet per second, the applicant must show the projected uses to be reasonable, based on a consideration of:

1. The existing and future demands on the state water supply, including needs to preserve instream flows for aquatic life;
2. The benefits to the applicant and the state;
3. The effects on the quantity and quality of water for existing uses in the source of supply;
4. The availability and feasibility of using low-quality water for the purposes outlined in the application;
5. The effects on private property rights by the creation or contribution to saline seep; and
6. The probable significant adverse environmental impacts of the proposed water use (Section 85-2-311(2)(c), MCA).

In addition to outlining these criteria, the statute clarifies the DNRC's authority to issue permits subject to terms, conditions, restrictions, and limitations considered necessary to satisfy these criteria. The statute also allows the state to

condition appropriations for transport out of specified basins and all out-of-state transport of water. The reasonable use/public interest criteria can thus be used to condition certain appropriations to protect instream values.

While these reasonable use/public interest criteria are potentially useful in protecting instream flows, their real effectiveness is limited since they apply only to applications for very large amounts of water, and consequently they have not yet been applied to protect instream flows. Not only are there few water permit applications large enough to trigger these reasonable use/public interest criteria, but there may be cases where even a small new use can cause an unacceptable impact to instream values. In addition, the criteria do not take into consideration the cumulative impacts of consumptive uses on instream values in a given river. That is, several appropriations on a river, each less than the 4,000 acre-feet threshold, together may significantly reduce the flow in the river and thereby threaten instream values. The criteria also do not relate the size of the application to the size of the river--i.e., an application for less than 4,000 acre-feet may be acceptable on a large stream but devastating to a small one.

#### 5. Federal Reserved Water Rights

The federal reserved rights doctrine assures that Indian lands and public lands set aside or reserved by the United States for a particular purpose have adequate water. More specifically, the doctrine recognizes rights to a quantity of water sufficient



to fulfill the specific purposes for which the land was reserved. Unlike other water rights, reserved water rights on federal and Indian land have a priority dating back to when the reservations were established, even if the actual use of reserved begins long after other water users have appropriated water from the stream.

While the reserved rights doctrine provides that federal land management agencies have a legal right to enough water to satisfy the original purposes of the various reservations, such quantities may not always be sufficient to protect the most valuable instream benefits. This is especially true on lands administered by the U.S. Forest Service and the Bureau of Land Management (BLM). The U.S. Forest Service is allowed to reserve water only for purposes of timber and watershed protection; it is not allowed to acquire reserved rights for recreational, scenic, and wildlife protection purposes (*United States v. New Mexico*, 438 U.S. 696, 98S.Ct.3012, 1978). It is not clear whether the reserved rights for national forests include instream flows (*United States v. Jesse*, 744 P.2d 491, Colo., 1987). Since the public lands under the jurisdiction of the Bureau of Land Management were not withdrawn from the "public domain" when Congress passed the Federal Land Management and Policy Act, the statutory framework for the BLM, no water rights were reserved by the Act's passage (*Sierra Club v. Watt*, 659 F.2d 203 D.C.Cir. 1981).

In contrast to these multiple-use resource management agencies, the National Park Service and the U.S. Fish and

Wildlife Service are in a better position to protect instream values given the original purposes of their reservations of land (i.e., national parks, wildlife refuges, etc.). According to a Department of the Interior Solicitor's Opinion, the National Park Service may acquire reserved water rights for scenic, natural, and historic conservation uses, wildlife conservation, and public enjoyment, while the USFWS may claim reserved rights for purposes of protecting migratory birds and other wildlife (88 Interior Decisions 553, 1979).

In addition to the inherent limitations of the federal reserved rights doctrine as a mechanism to protect instream flows, there have been problems in quantifying and negotiating the flows required to protect various uses. Given the large volumes of water requested, along with the seniority of their priority dates, the issue is politically volatile, and final decisions are therefore slow in the making.

To date, all the federal land management agencies within Montana, including the Bureau of Land Management, along with the Indian tribes on the state's seven reservations, have claimed federal reserved water rights. The claims are currently under negotiation with the state's Reserved Water Rights Compact Commission. While instream flow rights have been asserted by the land management agencies, only the Confederated Salish and Kootenai tribes are likely to claim for instream flows. Under the Fort Peck Compact, the tribes and the state agreed to allocate a portion of the tribal reserved rights for consumptive uses to instream uses.

## 6. Wild and Scenic Rivers

The federal Wild and Scenic Rivers Act was designed to preserve in a free-flowing condition certain rivers possessing outstanding scenic, recreational, geologic, fish and wildlife, historic, cultural, and other similar values. It provides a process by which rivers may be recommended for inclusion, studied, and eventually included in the wild and scenic rivers system. The Act prohibits the Federal Energy Regulatory Commission from licensing water projects on, or directly affecting rivers included in the system, and provides interim protection for rivers under study for inclusion.

The Wild and Scenic Rivers Act has been used, in effect, to protect instream values on four stream reaches in Montana - the North, South, and Middle forks of the Flathead River, and on one reach on the Missouri River. The Act contains an express assertion of a federal reserved water right for the amount of water which is reasonably necessary for the preservation and protection of those features for which the rivers were designated (88 Interior Decisions 553, 1986).

In addition to the four stream reaches that have already been protected, the U. S. Forest Service is currently in the process of identifying eligible rivers for inclusion in the wild and scenic river system. To date, 15 river segments have been identified as eligible on five national forests in Montana, including the Bitterroot, Gallatin, Kootenai, and Custer national forests. These rivers constitute a total of 382 total stream miles, with two segments or 96 miles classified as scenic; nine

segments of 179 miles classified as recreational; and four segments or 107 miles classified as wild and recreational (with 69 miles classified as recreational and 38 miles classified as wild). The forest plans that are currently in the draft stage will document the results of the eligibility study in the final forest plans. The national forests which have released final forest plans, including the Beaverhead, Flathead, Helena, Lewis and Clark, and Lolo national forests, are in the process of identifying eligible rivers and will incorporate the eligibility study in a future forest plan amendment. All the forest plans must provide for the protection of eligible river segments until a future decision is made on possible wild and scenic designation. A separate suitability study will be completed for each eligible river segment some time after the final forest plans are released.

#### 7. Indian Treaty Fishing Rights

Another means of ensuring instream flows in Montana exists when Indian tribes have treaty fishing rights on a river. Interference with river flows by diversion, impoundment, or pollution of waters so that fish habitat is damaged may reduce the ability of tribes to take a meaningful share of fish as guaranteed in their treaties. A situation recently emerged in Montana where the Indian tribes claimed instream flows for the protection of fish under their treaty, as distinguished from a claim for a federal reserved right.

In the summer of 1986, the U.S. Bureau of Indian Affairs (BIA) established a minimum streamflow policy for the Flathead

Reservation in northwest Montana. One of the effects of the policy was to diminish the water available for non-Indian irrigated agriculture. At the request of the irrigators, a federal district court in Montana granted a preliminary injunction prohibiting the BIA from implementing the policy protecting reserved water rights for tribal fisheries to the detriment of non-Indian irrigation (Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States of America and Confederated Salish and Kootenai Tribes of the Flathead Reservation (832 F.2d 1127 9th Cir 1987)).

The Ninth Circuit Court of Appeals dismissed the preliminary injunction and remanded the case to the district court on grounds that the district court erred in applying the principle of "just and equal distribution." This principle assumes that all who seek a right to the water stand on the same footing, notwithstanding the lack of an adjudicated decree establishing priorities among water right users. The injunction failed to accord the aboriginal fishing rights the protection federal law gives them against the claims and considerations of junior appropriators. Since the priority of the aboriginal fishing rights are dated time immemorial, they obviously predate all competing rights, and the district court erred in holding that water claimed under tribal aboriginal fishing rights must be shared with junior appropriators.

Since this case was appealed and has been remanded to the district court to determine the extent to which the tribes are entitled to instream flows under their treaty, it remains to be

seen how effective this strategy will be in protecting instream values. Assuming that the district court rules consistent with the Court of Appeals decision and is favorable for the Indian tribes, the strategy is still somewhat limiting since it may to apply only to Indian reservations.

#### 8. The Public Trust Doctrine

The Montana Supreme Court applied the public trust doctrine, apparently for the first time, in two 1984 decisions: Montana Coalition for Stream Access v. Hildreth (684 P.2d 1088 Mont. 1984); and Montana Coalition for Stream Access v. Curran (682 P.2d 163 Mont. 1984). The issue in both cases was the public's right to use water courses for recreational purposes, such as floating and fishing. The Court rejected arguments by private landowners that public recreational rights extend only to those watercourses whose beds are owned by the State of Montana, that is, only to those watercourses navigable under the federal test for title purposes. Instead, the court held that "under the public trust doctrine and the Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."

In response to these cases, the legislature passed the "Stream Access" bill (Section 23-2-301 to 322, MCA) in 1985 in an attempt to provide management policies that address and help implement the Curran and Hildreth decisions. The statute provides that all surface water capable of recreational use may

be so used by the public without regard to the ownership of the land underlying the waters. It also allows the public access to private lands in order to portage around barriers in the least intrusive manner.

In *Galt v. State* (731 P.2d 912, 1987), the statute was challenged as an unconstitutional taking of private property without just compensation. While the district court upheld the statute and provided guarded summary judgment to the state, the Montana Supreme Court reversed the decision in part by holding as unconstitutional those provisions which allowed uses not necessary to the public's utilization of water and which required the landowner to maintain portage routes. This decision further defined and limited the application of the public trust doctrine to recreational water use in Montana.

The significance of these decisions for the protection of instream flows is difficult to assess. The issue before the court--the public's right to use waterways for recreation--does not raise a question regarding the duties or limitations that may be imposed on the state or its licensees in the use of water resources. In addition, the court in *Curran and Hildreth* cited a provision of the Montana Constitution specifying that all waters of the state are "the property of the state for the use of its people" as an alternate basis for its decisions. Thus, some observers assume and argue that the court's reference to the public trust doctrine is only "dicta" (a remark or observation). If the court's references to the public trust doctrine are dicta, the precedential force of the opinions is greatly weakened,

making it easier to ignore or limit the doctrine in future cases. It remains to be seen whether the doctrine can be used for the protection of instream flows in Montana.

#### 9. Reservoir Management

The construction, operation, and maintenance of reservoirs for hydroelectric power production and water storage may threaten instream values by increasing the uncertainty of river flows. (In some cases it may also decrease uncertainty and facilitate instream flow protection providing a more or less constant flow regime throughout the year.) However, several mechanisms have been applied in Montana to manage reservoir flows for fish and other instream uses. While some of these mechanisms require the consideration of fish and wildlife values in projects constructed by the federal government, as well as in those licensed by it, other mechanisms are pursued and established at the discretion of an administrative agency.

Two federal statutes have been used in Montana to condition water use licenses or permits. First, the state has used the Federal Power Act to condition hydropower licenses by requiring them to release a certain amount of flow at specified times to protect valuable fisheries. The 1986 Electric Consumers Protection Act amendments (P.L. 99-495) to the Federal Power Act, (16 U.S.C. 291 et seq.) along with the regulations adopted pursuant to this act, requires the Federal Energy Regulatory Commission (FERC) to find that a proposed project is best adapted to a comprehensive plan for a waterway, including navigation,



water power, and other beneficial public uses, such as recreation and fish and wildlife (16 U.S.C. 791(a)). To facilitate this objective, each license issued by FERC shall include conditions for the protection, mitigation, and enhancement of fish and wildlife affected by the development, operation, and management of the project (16 U.S.C. 803(j)). The conditions are to be based on recommendations received under the Fish and Wildlife Coordination Act from the U.S. Fish and Wildlife Service and state fish and wildlife agencies. If FERC believes that any recommendation is inconsistent with the purposes of the license, it must publish findings to that effect as well as specify conditions that satisfy the requirement outlined above.

Second, the Pacific Northwest Electric Power Planning and Conservation Act (16 USCA, 839) contains significant requirements for preserving and restoring anadromous fish as well as resident fisheries. A regional council created by the act is directed to develop a plan for the protection, mitigation, and enhancement of fish and wildlife, and managers of federal power facilities are required to afford "equitable treatment" to fish and wildlife, insuring that their operations do not subordinate fish and wildlife to other project objectives. This strategy has been used by the Montana Department of Fish, Wildlife, and Parks to maintain resident fisheries on both the South Fork and the mainstem of the Flathead River below the Hungry Horse Dam by requiring a minimum flow release from the reservoir.

In addition to conditioning water rights permits, the State of Montana has also negotiated with reservoir operators,

including the Corps of Engineers, the Bureau of Reclamation, the Montana Power Company, Washington Water Power Company, and state operators, for voluntary releases of water at several reservoirs to protect instream values. The majority of these agreements are usually written but informal. To date, agreements or management plans have been developed at six reservoirs, including Canyon Ferry, Yellowtail, Hebgen, Hauser, Holter, and Painted Rocks reservoirs, and are being negotiated at several other reservoirs.

In general, when the state enters into negotiations with reservoir operators, the operator typically maintains control of the flow releases but attempts to provide streamflows that will satisfy instream flow needs. The reservoir operator may also exercise options, such as buying power from other sources to insure minimum stream flows can be provided (this approach was taken by the Bureau of Reclamation at Canyon Ferry Reservoir during the drought of 1987). The Department of Fish, Wildlife, and Parks may prioritize its requests for streamflows in the event of inadequate water. For example, a lower summer flow than desired may be prescribed in order to save water for spawning fish in the fall. The outflow and reservoir levels may be discussed annually or more often if necessary. Advisory committees, including other water users and interested parties, are often consulted to convey information about present and future conditions affecting a reservoir operation and to reevaluate as need said priorities.

Two of the more successful negotiated agreements have helped protect instream values on the Madison and Ruby rivers.

The Madison River is one of Montana's best known trout streams. Located in the headwaters of the basin is Hebgen Dam, a privately-owned facility that partially regulates the river and is largely used for storage to enhance hydropower generation downstream. Although the project provides important benefits to the state, releases of water from the reservoir have historically had a deleterious impact on the river's fishery production. In search of a solution to this ongoing problem, personnel from the Montana Department of Fish, Wildlife, and Parks approached the Montana Power Company, owner of the facility. The parties were able to design a voluntary release pattern from the dam that substantially improved fishery habitat conditions in the river and, at the same time, preserved much of the owner's hydropower generation prerogative. Overwhelming public support for enhancing the fishery in the Madison River and the willing participation by the Montana Power Company were instrumental in the success of these negotiations.

The Ruby River in southwestern Montana near Dillon has a valued trout fishery with regional significance. At the same time, flows in the river are heavily used for widespread irrigation in the basin. In fact, a state-owned water project on the river includes a 38,850 acre-foot reservoir with a delivery system that provides both full service and supplemental flows to about 40,000 acres of land. Currently, instream water rights have not been established on the river.

Early in the severe droughts of 1985 and 1987, irrigation diversions completely dried up a critical reach of the river.

recognizing the responsibility to preserve the important fishery resource, state agency officials briefed local water users about the situation and its consequences. In turn, it was agreed that additional water would be released on a short-term basis from the Ruby River Reservoir to satisfy both irrigation and instream flow needs downstream. Once again, public concern for protection of instream uses was important in the decision to increase reservoir releases. Equally significant, these increased instream flows were made possible even though the water involved was contractually committed to irrigation use. Nonetheless, the state and local water users negotiated an agreement to maintain instream values as well as protect irrigated agriculture. A more permanent solution to this potentially recurring problem is now being developed.

To complement efforts at negotiating voluntary releases from reservoirs to protect instream values, the state has also purchased reservoir storage on several occasions to protect important fisheries and recreational opportunities. This strategy was used on the Bitterroot River, a major trout and recreation stream that winds through the mountains of western Montana near the town of Hamilton. Over time, irrigation diversions along the river have increased to the point where they often seriously deplete the river and diminish the fish habitat and recreational floating opportunities. In the interests of developing a long-term solution to this recurring problem, state agency personnel have focused their attention on stored flows in the state-owned Painted Rocks Reservoir. Located in a headwaters

tributary of the Bitterroot River, the reservoir was originally built for irrigation use that has not fully materialized. Thus, storage capacity is regularly purchased to augment low flows in the mainstem Bitterroot River. In the 1950s, 5,000 acre-feet were purchased with an additional 10,000 acre-feet purchased in 1983. During the summers of 1985 and 1987, water purchased by the Department of Fish, Wildlife, and Parks (DFWP) and released from Painted Rocks Reservoir for instream use was depleted by downstream irrigation users. As a result, several sections of the river were nearly dried up. After negotiations between the DFWP and the irrigation companies, a petition was jointly submitted to the District Court. The Court, in turn, appointed a water commissioner to ensure delivery of the purchased water.

Water has also been purchased from Newland Creek Reservoir, a privately managed reservoir off the Smith River. Although there is little demand to purchase the water at this time, the operators want to limit the amount of water they sell to DFWP. This has not limited the ability to protect instream flows below the reservoir, however, since the morphology of the stream channel limits the amount of optimum discharge.

#### 10. Adjudication Proceedings

Pursuant to Section 85-2-223, MCA, the Montana Department of Fish, Wildlife, and Parks may represent the public in adjudication proceedings for purposes of establishing any public recreational uses of water prior to 1973. The policy of the

Department of Fish, Wildlife, and Parks is to represent the public only when a specific request is received. This authorization has been used to apply for claims on several rivers and lakes, including the Bitterroot River, the Beaverhead River, and Bean Lake.

To date, the only claim that has entered adjudication is Bean Lake, and it has been challenged by several parties. The Department of Fish, Wildlife, and Parks filed a claim in 1982 for an existing water right in Bean Lake, claiming recreational and fish and wildlife uses, with a priority date of 1951. In a recent decision, the court ruled that the claim is invalid because the Department of Fish, Wildlife, and Parks never diverted or impounded the lake water, and never demonstrated an intent to claim the water right or gave notice to other water users of that intent.

This decision has potentially significant implications with respect to the use of this strategy to protect instream values, and it is currently on appeal to the Montana Supreme Court. While Section 85-2-223, MCA, states that the statute "shall not be construed in any manner as a legislative determination of whether or not a recreational use sought to be established prior to July 1, 1973, is or was a beneficial use," the Bean Lake decision indicates that recreation and fish and wildlife uses are beneficial uses. However, the Court appears to discourage recognition of these uses where they occur instream because the other requirements for a valid use right (i.e., a diversion, an intent to appropriate, notice to other appropriators) are

difficult, if not impossible, to demonstrate. Nonetheless, the Department of Fish, Wildlife, and Parks argues the diversion requirement for a valid beneficial use is antithetical to instream flow protection and thus, not an appropriate indication of intent and notice.

#### 11. De Facto Protection

In many cases, instream flows are protected by the delivery of large quantities of water to downstream users with senior water rights. The protection of instream flows in these situations, however, is not legally recognized, and may be lost by water transfers or other types of diversions. While this strategy is attractive in theory, it could only work in practice if water rights are adjudicated and then enforced voluntarily or by the timely appointment of and funding for water commissioners.

#### IV. PROSPECTS FOR THE FUTURE

Although Montana has made significant progress in protecting instream flows, the current approach is fragmented, consisting of several strategies but no comprehensive or coordinated plan. In addition, there has been little coordination between state and federal agencies in protecting instream flows. In light of these limitations, the state is currently in the process of developing a comprehensive, coordinated strategy for instream flow protection as part of the state water plan.

Unlike other technically-oriented planning exercises, the state water planning process is designed to build a consensus among all water users and result in action on selected water resource issues. The planning process will identify policy goals and objectives for instream flow protection, document and evaluate the various policies, programs, and practices outlined above, and recommend appropriate actions to improve the protection of instream flows in Montana. The plan will utilize existing administrative structures in assigning implementation responsibilities, and will be documented by a short, issue-oriented pamphlet that will be kept in a three-ring notebook along with other components of the state water plan. This format is flexible and allows the plan to adapt to changing times and circumstances.

In addition to documenting and evaluating existing strategies for the protection of instream flows, the state water plan will provide a framework for identifying instream flow objectives, assessing the various strategies available to protect instream flows in a given situation, and then selecting the strategy that will most efficiently and effectively accomplish the objectives. It will also provide a mechanism for assessing the trade-offs between instream and offstream uses of water. Finally, the plan will attempt to encourage the quantification of flow requirements for wildlife and riparian habitat, recreation, and scenic and aesthetic values; encourage the development of an effective means to monitor instream flows; and encourage federal land management agencies to utilize the reservation program to



protect instream values they may not be able to protect under the reserved rights doctrine.

In addition to examining the possibility of fine-tuning several existing policies, programs, and practices, the water plan may also examine the application of new approaches to instream flow protection, such as water transfers and invoking the public trust doctrine. The alternatives currently envisioned by the state water plan include refining the reservation process; revising the reasonable use/public interest criteria; appointing water commissioners in adjudicated basins; encouraging the transfer of water rights; and applying the public trust doctrine. These alternatives are designed only to represent the broad range of strategies potentially available to the state for instream flow protection, and in no way are being recommended as policies that the state should adopt.

#### 1. Refining the Reservation Process

Montana's water reservation process, the principal mechanism for protecting instream values in the state, might be improved in several ways. However, as with most water policy and management decisions, there are trade-offs involved with the proposed improvements.

One way to refine the water reservation statute is to streamline the entire application process, making it less data intensive and therefore less time consuming. While reducing the amount and detailed nature of the information required might improve the efficiency of the reservation process, it would also

limit the ability of decision-makers to make rationally informed judgments. Given the long-term commitment of water resources appropriated through the reservation process, it is desirable to base such decisions on the best information available. In addition, a comprehensive technical data base may protect instream flow reservants during the periodic review by soundly establishing the need for the reservation.

Another way to potentially improve the water reservation process is to establish individual priority dates for reservations. Currently, the Board only sets priorities among types of use, and not among individual reservants. For example, in the Yellowstone River Basin, the priority of uses is as follows: municipalities; instream flows in the upper basin; irrigated agriculture; instream flows in the lower basin; and finally offstream water storage. The problem with this system of establishing priorities is that in times of water shortage, there is no way to administer priorities among individual water users. While this problem has yet to arise in the Yellowstone River Basin, it is not unlikely that it will become a problem in this and other river basins within the state. One way to resolve this issue before it becomes a problem is to simply establish priority dates for each individual water user, as is done in the water permitting process. Such a process could be built into and complement the current process of setting priorities among types of use.

In addition to establishing individual priority dates for reservations, the water reservation process might also be

improved by establishing the priority dates for reservations at the time applications are filed, rather than when the Board of Natural Resources and Conservation makes its final decision. Since the reservation process is very time-consuming, establishing individual priority dates at the time of application would create an earlier priority date for instream reservations and thereby increase the degree to which instream values would be protected in certain cases. In addition, it would protect the reservations from permits that are acquired while the reservation applications are being reviewed. Establishing the priority date at the time of application would also increase the certainty of the entire reservation process. On the other hand, if the priority date for reservations were established at the time of application rather than when the Board makes a final decision, it would eliminate the Board's ability to take a comprehensive look at the competing demands within a given watershed, to assess trade-offs, and to establish priorities among water users.

Yet another way to potentially improve the water reservation statute with respect to instream flow protection is to somehow relax or eliminate the periodic review requirement. While the periodic review of all water reservations allows the state to determine if the reserved water is being put to a beneficial use and to reevaluate water use allocation within a river basin, it does not provide much security to instream reservations or to non-developed consumptive use reservations. If the Board determines that through either the five- or ten-year review process the public interest would be better served by

consumptive water uses rather than instream uses, instream flow reservants may lose their rights to use the water in question.

One way to increase the security of all reservations, including those for instream uses, is to only review those reservations that have not been perfected. This policy would not only dismiss perfected rights from being reviewed and potentially modified, but also subvert attempts at water speculation by reviewing and reallocating reservations that are not perfected. Instream flow reservations could be considered perfected once the rights are granted or when the reservant establishes an effective system for monitoring the flows.

Finally, instream values might be better protected through a reservation if the current stipulation that no more than 50 percent of the average annual streamflow can be reserved for instream flows on streams with gauges is revised or eliminated (Section 85-2-316(6), MCA). This quantity of water may not be sufficient in all cases to protect fish, wildlife, recreation, and other instream values. An alternative is to allow instream reservations for as much water as is necessary to protect instream values. However, allowing applicants to reserve more than 50 percent of the average annual streamflow poses the risk of committing a large portion of the available flow in a basin to instream flow purposes, thereby eliminating opportunities for offstream, consumptive uses of water.

## 2. Revise the Reasonable Use/Public Interest Criteria

Another way to improve the protection of instream values in Montana may be to reduce the water right application size that

triggers the reasonable use/public interest criteria. As described above, these criteria are only considered when an applicant wishes to appropriate more than 4,000 acre-feet per year and 5.5 cubic feet per second. To date, the criteria have not been applied to protect instream flows since no application has arisen that would trigger the criteria. The criteria are not applicable to smaller water projects that may threaten instream values just as much as the larger projects, nor do they relate the size of the application to the quantity of water available in a watercourse.

The reasonable use/public interest criteria may more effectively protect instream values if they were applicable to any proposed new water use permit or any transfer of water rights. Another alternative is to relate the size of the water right application to the amount of water available in a stream, and apply public interest criteria when the application is more than a given percent of the available flow. In addition, the criteria could be revised to consider the cumulative impacts of water appropriations on an entire river basin.

### 3. Appointing Water Commissioners in Adjudicated Basins

Instream values may be protected in certain cases by the delivery of large quantities of water to downstream users with senior water rights. However, this strategy cannot work effectively, if at all, unless the water rights are adjudicated and then entered either voluntarily or by the timely appointment of water commissioners.

The primary enforcement measure in the adjudication process occurs through court-appointed water commissioners, which requires at least 15 percent of the water users to petition the court. However, from a practical perspective, landowners are often slow to petition the court to shut off their upstream neighbors. In the case of Gallatin River in 1985, the stream went completely dry before the court was petitioned. These delays do not protect instream values because the fishery is lost before streamflows are returned, assuming any action occurs at all.

The state might consider using "trigger flows," or flows below which instream values become threatened, to appoint water commissioners in adjudicated basins thereby assuring some level of instream flow protection. The relationship of streamflow between adjudicated basins would also have to be taken into account.

#### 4. Transfer of Water Rights

One strategy for protecting instream values that has not been applied in Montana, but may offer significant potential, is to transfer water rights via purchase, lease, or gift from consumptive water users to the state or to other entities for instream flow purposes. This strategy might also be facilitated by increasing water use efficiency and conservation and, in turn, legally allocating the conserved flows to instream uses.

In certain circumstances, existing consumptive water rights might be sold voluntarily to a state agency, with the water

normally depleted from the stream legally accruing to instream flows. Water use efficiency might also be encouraged or paid for by the state, again with the conserved water being legally appropriated by to a state agency for instream use. As an alternative to the purchase of existing rights, agricultural water rights might be leased for instream purposes. Through this approach, an agricultural user would receive annual lease payments and continue to operate as usual until drought occurs and water for instream purposes becomes critical. During the drought period, and in accordance with the lease agreement, the irrigator would cease his normal water use and allow the flows involved to remain instream. Even though the consumptive use would be curtailed, the irrigator would have been compensated for this loss and may be able to use the land involved for a non-irrigated crop.

While the transfer of water rights may allow the state to acquire senior rights for the protection of instream uses, there are currently several legal and motivational obstacles to realizing such transfers. Montana water law allows appropriative rights to be transferred provided that such transfers do not adversely affect the water rights of other persons, and the proposed use is a beneficial use (Section 85-2-402). However, the Bean Lake decision discussed above held that, among other reasons, a claim filed by the Department of Fish, Wildlife, and Parks for an existing water right for recreational and fish and wildlife purposes is invalid because of the lack of diversion facilities. Unless this decision is overturned by a higher court

or the Legislature revokes the diversion requirement, the ability to transfer water from consumptive uses to instream uses is extremely limited.

Even if existing consumptive water rights could be voluntarily sold or otherwise transferred to a state agency with the water normally depleted from the stream legally accruing to instream flows, there is still the possibility that the right may be considered abandoned. There is little incentive to conserve water if it cannot be sold or otherwise transferred. In order to use this approach, water right abandonment statutes may have to be amended so that permanent or temporary transfers of conserved water would not result in the permanent loss of the right.

#### 5. Apply the Public Trust Doctrine

Since the State of Montana has several legislative and administrative strategies available to protect instream values, the public trust doctrine is likely to be employed, if at all, only as a last resort to protect the public interest. While the application of the public trust doctrine in Montana has been very limited, there are important precedents throughout the west that may lead to more specific applications with respect to protecting instream values.

Historically, the public trust doctrine protected the public's rights to use navigable waters for navigation, commerce, and fishing. Recent decisions, however, have expanded the protection to other water-related activities. These activities include hunting, swimming, rafting, boating, bathing, and even to



preserve tidelands "in their natural state so they may serve as ecological units for scientific study, as open spaces, and as environments which provide food and habitat for birds and marine life, and which favorable affect the scenery and climate of the area" (National Audubon Society v. Superior Court of Alpine County, 189 Cal. Rept. 346 (1983)). In an effort to accommodate water use and the public trust doctrine, the court in the case cited above held that the state "has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." The court recommends that this balancing test be on a case-by-case basis.

While a similar approach in Montana would require a judicial decision, such a strategy may be important as a last resort to protecting valuable instream flows and the public's interest in free-flowing water. An alternative application of the public trust doctrine would be to encourage the state to finance water conservation measures with the salvaged flows allocated to the state to protect instream flows on behalf of the public trust. This approach would get away from a strict taking of private property without compensation by allowing the parties to negotiate a solution that protects both the existing consumptive use rights as well as the public trust values.

## V. CONCLUSION

Throughout the West, and particularly in Montana, policymakers are seeing an increasing concern over the preservation, if not the enhancement, of flows for a diversity of instream uses. In turn, this rightful concern has spawned conflict with those who divert our Western waters in support of varied consumptive use needs. At best, resolution of these conflicts is difficult and, in certain notable instances, has necessitated the judicial invocation of the public trust doctrine. Montana has turned to legislative and administrative action as a more flexible remedy to the various instream flow-consumptive use conflicts that have arisen.

The steps being taken to protect the instream resources of Montana have clearly been substantive and beneficial. Yet, in spite of all the successes, a number of problem areas remain to be addressed. Recognizing that the effort to date has been somewhat piecemeal, the state is preparing a more comprehensive strategy for dealing with this issue. Being developed under the aegis of the state water plan, the strategy will document and evaluate existing strategies for the protection of instream flows, as well as provide a framework for identifying instream flow objectives, assessing the various strategies available to protect instream flows in a given situation, and then selecting the strategy that will most efficiently and effectively accomplish the objectives. It will also attempt to encourage the quantification of flow requirements for wildlife and riparian

habitat, recreation, and scenic and aesthetic values; encourage the development of an effective means to monitor instream flows; and encourage federal land management agencies to utilize the reservation program to protect instream values they may not be able to protect under the reserved rights doctrine.

With such a strategy, state action is expected to evolve so that it more adequately provides for the values associated with instream uses and, at the same time, recognizes the importance of existing consumptive uses.

## BIBLIOGRAPHY

- Duffield, John, John Loomis, and Rob Brooks, The Net Economic Value of Fishing in Montana (Draft Report, August, 1987).
- Fritz, Gary, Pat Graham, and Gerhard Knudsen, "Public Rights in Water - A Montana Perspective, " in Proceedings of the 3rd Annual Western States Water Council Water Management Symposium (Los Angeles, CA, 1986): 97-107.
- Hyra, Ronald, Methods of Assessing Instream Flows for Recreation (Instream Flow Information Paper No. 6, FWS/OBS-78/34, 1978), U.S. Fish and Wildlife Service, Fort Collins, CO).